FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

December 14, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. KENT 2000-128-R
	:	KENT 2000-129-R
v.	:	KENT 2000-130-R
	:	KENT 2000-168
	:	
KINDER MORGAN OPERATING L.P. "C"	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Kinder Morgan Operating L.P. "C" ("Kinder Morgan") three citations alleging violations of mandatory safety standards. At issue is whether Administrative Law Judge T. Todd Hodgdon correctly determined that the site at which the violations allegedly occurred constitutes a "mine" within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). 23 FMSHRC 73 (Jan. 2001) (ALJ). We granted Kinder Morgan's petition for discretionary review challenging the judge's determination of jurisdiction. In addition, the Commission heard oral argument on the matter.

Commissioners are evenly divided regarding the disposition of this case. The effect of the split decision is to leave standing the judge's affirmation of the citations and assessment of penalties. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The portion of the decision upon which all Commissioners agree is followed by the opinions of Commissioner Jordan and Commissioner Beatty, and of Chairman Verheggen and Commissioner Riley, respectively, setting forth their separate views.

I.

Factual and Procedural Background

The facts underlying the alleged violations are not contested. Joint Stipulation ("JS") at 1.[1] Kinder Morgan operates the Grand Rivers Terminal (the "Terminal"), a marine terminal near Grand River, Kentucky. 23 FMSHRC at 74. The Terminal consists of three separate areas: (1) a rail-to-ground unloading and storage facility ("GRT-1"); (2) a rail-to-barge loading facility ("GRT-2"); and (3) a barge-to-ground unloading and ground-to-barge loading facility ("GRT-4"). *Id.* Kinder Morgan annually receives an average of approximately 10 million tons of processed coal from various mines at the Terminal by rail (95%) and by barge (5%). *Id.*; JS at 3. It is a bailee of the coal in that the coal is owned by the end user, rather than by Kinder Morgan, and Kinder Morgan is responsible for the coal only from the time that it is unloaded until the time that it is subsequently reloaded. 23 FMSHRC at 74. More than 95% of all coal received by the Terminal is owned and shipped to the Tennessee Valley Authority ("TVA"), which purchases the coal for use in its 11 coal-fired plants. *Id.* Alabama Power and West Kentucky Energy have historically delivered and received the non-TVA coal. *Id.* at 76.

No washing, screening, crushing, or sizing of coal occurs at the Terminal. *Id.* at 74. TVA requires the coal of each coal producer to meet certain specifications, and it is the responsibility of the coal producer or supplier to meet those specifications prior to loading the coal on to trains or barges at the coal producer's or supplier's loading facilities. JS at 4-5. For instance, in its various contracts with different producers of Illinois basin coal and Western coal, TVA requires the coal of each producer to meet certain specifications such as moisture content, ash content, percentage of volatile matter, heating value (BTU), SO_2 content, grindability and chlorine content. *Id.* at 4. Kinder Morgan is not a party to TVA's contracts with the coal producers, and has no responsibility to deliver coal to TVA that meets the contract specifications. 23 FMSHRC at 74.

As described more fully below, coal shipments are processed through the Terminal in three ways: (1) rail-to-stockpile-to-barge; (2) barge-to-stockpile-to-barge; and (3) rail-to-barge. *Id.*

TVA Coal: Rail-to-Stockpile-to-Barge. When coal is processed from rail to stockpile to barge, the coal is first unloaded from rail cars into a 100-ton hopper at GRT-1.[2] *Id.* at 74. From

[1] The Secretary of Labor and Kinder Morgan stipulated to the facts in this proceeding. 23 FMSHRC at 74.

[2] The parties stipulated that "[a]pproximately 95% of coal received by rail is unloaded by Kinder Morgan at GRT-1 (the remainder being direct dumped at GRT-2)." JS at 5. That stipulation appears somewhat inconsistent with the parties' stipulation that "[a]pproximately twenty percent (20%) of the coal arriving at the Terminal by rail is unloaded from bottom dump rail cars at GRT-2 . . . ." *Id.* at 7. The judge did not resolve this apparent discrepancy. *See* 23 FMSHRC at 75. Nor was the matter clarified during oral argument. Oral Arg. Tr. at 12-13.

the hopper, coal is fed on to two stationary inclined belts which transfer the coal either to surface stockpiles (approximately 60% of the coal) or to a conveyor belt transfer system ("BTS"), connecting GRT-1 and GRT-4 (approximately 40%). *Id.* Coal in the surface stockpiles is subsequently moved by dozers and trucks into hoppers which deposit it on to the BTS, which conveys the coal to GRT-4. *Id.* at 75. Kinder Morgan maintains up to 18 working stockpiles for TVA's coal. *Id.* TVA selects coal from suppliers it designates and chooses the working stockpile where Kinder must place it. *Id.*

When the coal arrives at the GRT-4 via the BTS, it is dumped by a chute on to a 150-foot inclined belt on a radial stacker. *Id.* The radial stacker segregates the coal into separate stockpiles at GRT-4. *Id.* The radial stacker cannot create the required number of stockpiles, so some of the coal is pushed by dozers into stockpiles, and some of the coal is loaded into haulage trucks by front-end loaders for dumping into stockpiles. *Id.*; JS at 6.

When the stockpiled coal is to be loaded into a barge, it is pushed into one of four feeders. 23 FMSHRC at 75. The feeders are computer controlled to facilitate precise "layer-loading"[3] from different surface stockpiles. *Id.* Each feeder transfers coal at a predetermined rate on to the main belt in a 605-foot draw-off tunnel in the underground coal layer-loading facility. *Id.* The tunnel is concrete-lined throughout, and ventilated by two 30-inch diameter exhaust fans. JS at 6. Methane is monitored by hand-held methane detectors. *Id.* TVA identifies which stockpiles are to have coal removed and the amount to be removed. 23 FMSHRC at 75.

After leaving the draw-off tunnel, the coal is transferred on to a portable rail-mounted belt conveyor. *Id.* Samples of each coal load are then taken by TVA's independent laboratory, which collects, bags, and removes samples on a daily basis and sends them by courier to TVA's facilities in Tennessee for analysis. *Id.* The conveyor then loads the layered coal into barges for shipment as fuel to TVA. *Id.*; JS at 6.

TVA Coal: Barge-to-Stockpile-to-Barge. Approximately five percent of the coal processed at the Terminal arrives by barge at GRT-4. 23 FMSHRC at 75. Coal unloaded by barge at GRT-4 is never transported to GRT-1 or GRT-2. JS at 7. Coal is unloaded from barges at GRT-4 by a crane, which places it in a feeder for a 735-foot inclined belt on a stacker. 23 FMSHRC at 75. The coal is then stockpiled, as directed by TVA. *Id.* When the coal is to be loaded on to a barge, it is layer-loaded in an identical manner, described above, as the coal arriving at GRT-4 from GRT-1 on the BTS. *Id.*

TVA Coal: Rail-to-Barge. When coal is moved from rail to barge, it is unloaded from rail cars at GRT-2 into a surge bin. *Id.* at 76. It is then directly loaded on to TVA barges. *Id.* There is no on-the-ground storage or layer-loading of coal at GRT-2. *Id.* Coal is sometimes temporarily stored on the rail cars until it is time to load the barges. *Id.*

---

[3] Layer-loading occurs when coal is "loaded on top of other coals, akin to a parfait." JS at 5.

Non-TVA Coal. Non-TVA coal accounts for less than five percent of the coal received at the Terminal. *Id.* The non-TVA coal is unloaded, stored and loaded at the Terminal by Kinder Morgan in the same manner as TVA coal. *Id.*

Beginning in 1989, the Terminal was inspected by MSHA inspectors from the Division for Metal and Non-Metal Mine Safety. JS at 3. In 1998, the Terminal was first inspected by MSHA inspectors from the Division for Coal Mine Safety.[4] *Id.* On February 2, 2000, an MSHA inspector issued three citations to Kinder Morgan alleging significant and substantial ("S&S") violations of 30 C.F.R. §§ 77.205(b), 77.202, and 77.1104, which describe accumulations of coal and coal dust on the walkway of a load belt, on the belt and floor of the sample room, and in the load-out tunnel.[5] Citations Nos. 7641076, 7641077, 7641078. Kinder Morgan challenged MSHA's jurisdiction, although it did not challenge the facts underlying the alleged violations. 23 FMSHRC at 74. The parties stipulated to the facts and submitted briefs, and the matter was decided by Judge Hodgdon. *Id.*

The judge concluded that the Terminal was a "mine" subject to Mine Act jurisdiction. *Id.* at 79. He first relied on the definition of mine in section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), which includes "facilities . . . used in . . . the work of preparing coal," and the definition of "work of preparing the coal" in section 3(i) of the Act, 30 U.S.C. § 802(i). *Id.* at 76. The judge then reasoned that because Kinder Morgan engages in three functions listed in the definition of "work of preparing the coal," namely, "storing," "mixing," and "loading," the Terminal is subject to the Act under the "functional analysis" employed by the Commission in *RNS Services, Inc.*, 18 FMSHRC 523, 529 (Apr. 1996), *aff'd*, 115 F.3d 182 (3d Cir. 1997). *Id.* at 78. In addition, the judge noted that the delivery of coal in this case is a step earlier than delivery to the consumer after it is processed, which the Fourth Circuit Court of Appeals had stated would not fall within the coverage of the Mine Act. *Id.* at 78, *citing United Energy Services, Inc. v. MSHA*, 35 F.3d 971, 975 (4th Cir. 1994). He explained that Kinder Morgan was not the consumer of the coal and it engaged in further processing by layer-loading. *Id.* at 78-79. He further distinguished the marine terminal found to be outside Mine Act coverage in *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982), from the Terminal, on the basis that, unlike Elam, Kinder Morgan engaged in coal preparation usually performed by a mine operator by layer-loading coal to meet TVA's specifications and to render the coal fit for TVA's particular use. *Id.* at 79. Accordingly, the judge affirmed the citations and assessed penalties in the sum of $187 for all three citations, which the Secretary had proposed. *Id.* at 79-80.

---

[4] The Terminal has not been inspected by the Occupational Safety and Health Administration. JS at 3.

[5] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

Kinder Morgan argues that the judge erred in concluding that the Terminal is subject to Mine Act jurisdiction. KM Br. at 5-19. It asserts that the Mine Act does not apply to the handling of coal after it has been rendered useable and fully marketed to its final consumer, and that by the time that Kinder Morgan receives the coal, it is processed and marketed. *Id.* at 5-9. Kinder Morgan also submits that contrary to the judge's conclusions, coal is considered delivered to a consumer when it is loaded on trains or barges at a coal producer's loading facilities. *Id.* at 14-15. In addition, it contends that layer-loading does not constitute "mixing." *Id.* at 16.

The Secretary responds that the judge correctly concluded that the Terminal is subject to the Mine Act. S. Br. at 9. She submits that Kinder Morgan's storing, mixing and loading of coal constitutes the work of preparing the coal set forth in section 3(i) of the Mine Act. *Id.* at 13. The Secretary asserts that the test for jurisdiction set forth in *Elam* is satisfied because Kinder Morgan prepares coal to meet certain specifications, and prepares it for a particular use. *Id.* at 14-19. Accordingly, the Secretary requests that the judge's decision be affirmed. *Id.* at 24.

II.

Separate Opinions of the Commissioners

Commissioner Jordan and Commissioner Beatty, in favor of affirming the judge:

Section 4 of the Mine Act provides that "[e]ach coal or other mine, the product of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, "coal or other mine" is defined as including "lands, . . . facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal . . . . " 30 U.S.C. § 802(h)(1). Section 3(i) of the Mine Act defines "work of preparing the coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. § 802(i).

The legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a "coal or other mine" under the Act. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*"). *See Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cr. 1979), *cert. denied*, 444 U.S. 1015 (1980) ("[T]he
statute makes clear that the concept that was to be conveyed by the word [mine] is much more encompassing that the usual meaning attributed to it – the word means what the statute says it means.").

In considering the phrase "work of preparing the coal," the Commission has inquired not only into whether the entity performs one or more activities listed in section 3(i), but also into the nature of the operation performing such activities. *Elam*, 4 FMSHRC at 7-8. In *Elam*, the Commission explained that "'work of preparing [the] coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." *Id.* at 8. It concluded that although Elam performed several of the functions included in coal preparation at its commercial loading dock, it did so solely to facilitate its loading business rather than to meet customers' specifications or to render the coal fit for any particular use, and that, accordingly, its facility was not a mine. *Id.*

In contrast, in *Mineral Coal Sales*, the Commission determined that the handling of coal at a loading facility constituted "work of preparing the coal" because the work was performed to make the coal suitable for a particular use or to meet market specifications. *Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620 (May 1985). Such handling included custom blending or mixing the coal to meet the specifications and needs of a broker's customers, in addition to storing, crushing, sizing, and loading the coal on to railroad cars. *Id.* at 616-18, 620.

Applying the above criteria, we conclude that Kinder Morgan engages in the "work of preparing the coal," thereby bringing the Terminal within Mine Act jurisdiction. First, substantial evidence supports the judge's determination that Kinder Morgan engages in three activities listed in section 3(i) of the Mine Act as "work of preparing the coal." 23 FMSHRC at 78. It is undisputed that Kinder Morgan engages in "storing," and "loading" of coal at the Terminal. S. Br. at 14 n.3; KM Reply Br. at 2 ("If the Act applies to Kinder Morgan, then it applies to every entity who stores or loads coal . . . ."). In addition, substantial evidence supports the judge's determination that Kinder Morgan engages in "mixing," by layer-loading the coal. 23 FMSHRC at 78.[6] The contract between Kinder Morgan and TVA, entitled "Transloading and Blending Contract," refers to work performed by Kinder Morgan as blending and sets forth requirements for Kinder Morgan's operation and maintenance of its "blending systems." Rudd Aff. Ex. A at 1, 2; JS at 4. Thus, by layer-loading, Kinder Morgan engages in blending or mixing.[7]

Furthermore, substantial evidence supports the judge's determination that the second prong of the *Elam* test is satisfied, that is, that Kinder Morgan engages in work usually performed by the operator of a coal mine by undertaking the activities to make coal suitable for a particular use or to meet market specifications. As stipulated by the parties, Kinder Morgan maintains 18

---

[6] The term "mix" is defined as meaning "to stir, shake, or otherwise bring together with of loss of separateness or identity; to bring together in close association." Webster's Third New International Dictionary 1448 (1993). Synonyms for "mix" include "mingle," "commingle," and "blend." *Id.* In layer-loading the coal, coal from different stockpiles is "brought together in close association," and has lost the separateness that was maintained by individual stockpiles.

[7] The Commission previously has noted that a purpose of coal preparation has been described as increasing the value of fuel by making it more suitable for uses of the consumer in part by "mixing or blending." *Elam*, 4 FMSHRC at 8 n.5.

working stockpiles for TVA's coal, and TVA designates which coal from which suppliers will be placed into each working stockpile. JS at 5. In addition, TVA determines the individual working stockpiles from which coal is to be removed for layer-loading in the draw-off tunnel and for loading into barges. *Id.* at 7. Thus, it appears that Kinder Morgan engages in storing and mixing to meet TVA's specifications and to render the coal fit for TVA's particular use, i.e., as fuel in its power plants. 22 FMSHRC at 78-79. Because non-TVA coal is treated in the same manner as TVA coal (JS at 8), the same conclusions may be applied to handling of non-TVA coal. Therefore, the Terminal may be distinguished from the marine terminal found to be outside of Mine Act jurisdiction in *Elam*, which engaged in listed activities for its own loading purposes. Rather, like the loading dock held to be a "mine" in *Mineral Coal Sales*, 7 FMSHRC at 620, the Terminal handles coal to meet market specifications and for a particular purpose other than for its own use.

In concluding that the nature of the Terminal brings it outside of Mine Act jurisdiction, our colleagues rely upon factors that they conclude were applied in *Herman v. Associated Electric Cooperative, Inc.*, 172 F.3d 1079 (8th Cir. 1999). Slip op. at 9, 10. That decision involved an electric utility, which is distinguishable by its nature from the Terminal. Moreover, unlike the Terminal, the electric utility at issue in *Associated Electric* was the end-use consumer, a factor which the court found significant. 172 F.3d at 1080, 1083 ("If Congress wishes to expand the Act to cover consumers of coal such as utilities . . . , it is better suited to that task than this court."). In fact, other courts reviewing coal handling by utilities have concluded that such utilities fall within Mine Act jurisdiction. *See Pa. Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1504 (3d Cir. 1992), *aff'g* 11 FMSHRC 1875 (Oct. 1989); *United Energy Services*, 35 F.3d at 975. Further, at least one court has noted its disagreement with the decision in *Associated Electric*. *See In Re: Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1354 (2001) ("We do not entirely agree with the majority opinion of the Eighth Circuit in *Herman* and distinguish the facts from our present case . . . .").[8] In sum, we conclude that Kinder Morgan engages in the "work of preparing the coal" at the Terminal, and MSHA properly asserted its inspection authority over the facility.

[8] As evident in this case, Mine Act jurisdiction turns on the particular facts relating to each operator's activities. Thus, we do not share our colleagues' concern over MSHA's failure to articulate a bright line "uniform national standard" delineating the limits of that jurisdiction. Slip op. at 10.

For the foregoing reasons, we would affirm the judge's determination that the Terminal is a mine and uphold the citations and penalties.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, in favor of reversing the judge:

Our colleagues believe that the marine transportation terminal (the "Terminal") operated by Kinder Morgan Operating L.P. "C" ("Kinder Morgan") constitutes a "mine" within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). We disagree.

Section 3(h)(1) of the Act defines a "coal or other mine" in part as "lands, . . . facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal." 30 U.S.C. § 802(h)(1). Section 3(i) defines "work of preparing the coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. § 802(i).

In concluding that the Terminal constitutes a mine, our colleagues apply the test set forth in *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982), and opine that Kinder Morgan engaged in the "work of preparing the coal" within the meaning of section 3(i) of the Act. Slip op. at 6-7. In *Elam*, the Commission recognized that the determination of whether an operator engages in coal preparation involves an inquiry not only into whether the operator performs the activities listed in section 3(i), but also into the nature of the operation. 4 FMSHRC at 7. The Commission stated that "simply because [a company] in some manner handles coal does not mean that it automatically is a 'mine' subject to the Act." *Id.* The Commission further explained that "'work of preparing [the] coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." *Id.* at 8.

As the connection with the mining industry or proximity to the mine site or related facilities becomes more attenuated, factors other than those considered by our colleagues are relevant to the nature of the cited operation because they more fully illustrate whether the work performed at a facility is that "usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications."[1] *Id.* Such factors include whether the coal has been sold or has entered interstate commerce; whether MSHA has exercised jurisdiction over the entity that handled the coal before or after the cited company; the degree of handling performed; and whether such handling is the type usually performed by an end-use consumer. *See Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1082-83 (8th Cir. 1999) (finding no Mine Act jurisdiction based on such factors as whether coal had entered the stream of commerce; the degree to which the coal was processed by the cited entity; and whether such handling was that which is usually performed by an end-use consumer); *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 185 (3d Cir. 1997) (finding Mine Act jurisdiction based in part on consideration that

[1] Thus, such factors more fully define whether the coal handling being performed is that which is "usually done by the operator of the coal mine" within the meaning of section 3(i) of the Act. 30 U.S.C. § 802(i).

MSHA exercised jurisdiction on company that handled coal after the cited entity), *aff'g RNS Servs. Inc.*, 18 FMSHRC 523 (Apr. 1996). These factors must be balanced in accordance with the facts of each particular case.

As our colleagues have stated, it is undisputed that Kinder Morgan engages in at least two of the activities listed in section 3(i) at the Terminal. Slip op. at 6; *see* S. Br. at 14 n.3; KM Reply Br. at 2. We disagree, however, that our colleagues' cursory inquiry into the nature of the facility establishes that the Terminal is subject to Mine Act jurisdiction. Instead, we find that, after applying and balancing the factors set forth above, the work performed at the Terminal falls outside of Mine Act jurisdiction. Before any coal reaches the Terminal, it has already entered the stream of interstate commerce in that it has been sold to customers outside the mining industry. JS at 3, 8. In addition, there is no evidence in the record that MSHA has asserted jurisdiction over barges or railroad cars bringing coal to the Terminal, over barges transporting coal from the Terminal to TVA or other electric utilities, or over the utilities that unload, handle, and consume the coal. *See* KM Br. at 17 (suggesting that if Mine Act jurisdiction extends to the Terminal, it must also extend to such carriers and utilities). Here, the Secretary has selectively proclaimed MSHA jurisdiction over an island in the stream of interstate commerce without articulating a uniform national standard delineating the limits or extent of Mine Act authority over the transportation or utility industry.[2] Before plunging ahead, as the Secretary exhorts, the Commission would do well to ascertain how far along in that commercial current MSHA is inclined to drift and what other creatures inhabit the stream.

Moreover, given the degree to which the coal has already been processed before arriving at the Terminal, the degree of coal handling by Kinder Morgan is minimal. *See* JS at 4-5 (providing that the coal producer processes the coal to meet TVA's contract specifications before loading the coal on to railroad cars or barges en route to the Terminal). Further, it appears that the type of handling performed by Kinder Morgan is the type usually performed by an end-use consumer. *See* Oral Arg. Tr. at 7-8 (asserting that Kinder Morgan's activities are essentially the type of work regularly done by electric utilities). Thus, given that the coal has already been processed to meet market specifications and entered the stream of commerce, we conclude that more than the de minimis handling of coal performed by Kinder Morgan is required to bring the Terminal within Mine Act jurisdiction. *See Associated Elec.*, 172 F.3d at 1083 ("[A]fter a mine delivers processed, marketable coal to a utility[,] any further operations to prepare the coal for combustion are not subject to MSHA jurisdiction.").

---

[2] The record does not even provide a definitive answer to the question of whether the MSHA jurisdiction sought here applies to other marine terminals on the East or West Coast, the Great Lakes, or elsewhere on our inland waterways where commercial transport or shipping companies handle coal or other extracted minerals. *See, e.g.*, Oral Arg. Tr. 19-20.

Accordingly, we would reverse the judge's determination that the Terminal is subject to the Mine Act, and vacate the citations and associated civil penalties.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

James Park, Jr., Esq.
Warren Hoffman, Esq.
Medrith Lee Norman, Esq.
Brown, Todd & Heyburn, PLLC
2700 Lexington Financial Center
250 West Main Street
Lexington, KY 40507

Charles E. Allen, Esq.
Brown, Todd & Heyburn, PLLC
400 West Market St., 32nd Floor
Louisville, KY 40202

Tina Peruzzi, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041